TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 1001.

R. K. DOW, WATSON MATTHEWS AND CHARLES MORAN, PLAINTIFFS IN ERROR,

vs.

J. W. BEIDELMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED AUGUST 11, 1897.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 29, 1887.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Arkansas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between R. K. Dow, Watson Matthews, and Charles Moran, appellants, and J. W. Beidelman, appellee, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such statute, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 112th.

[The Seal of the Circuit Court U. S. A. of East. Dist. Ark., Western Division.]

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—
STERLING R. COCKRILL,
Ch. Justice Sup. C't Ark's.

1½ STATE OF ARKANSAS:

In the Supreme Court.

In obedience to the mandate of the within writ of error I have made out and duly certified a perfect, true, and correct transcript of the record and proceedings in the within cause, and the same is hereto attached.

Witness my hand and the official seal of the supreme court of Arkansas this the 6th day of August, 1887.

[Seal of the Supreme Court of Arkansas.]

W. P. CAMPBELL, *Clerk.*

2 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at

a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Arkansas, wherein R. K. Dow, Watson Matthews, & Charles Moran, trustees and plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sterling R. Cockrill, judge of the supreme court of Arkansas, this 13th day of July, A. D. 1887.

STERLING R. COCKRILL.

2½ Service of the within citation acknowledged July 15, 1887.

W. S. McCAIN,
Att'y for Beidelman.

3 STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Arkansas, begun and held at the court-house in the city of Little Rock, on the twenty-third day, being the fourth Monday, of May, A. D. 1887, amongst others, were the following proceedings, to wit, on the ninth day of July, 1887, a day of said term:

Appeal from Pulaski Circuit Court.

ROBERT K. Dow *et al.*, Trustees, Appellants,
v.
J. W. BEIDELMAN, Appellee.

JUNE 11TH, 1887.

On this day come the appellants and file herein the transcript of the record of Pulaski circuit court in this cause, which is as follows:

Transcript.

Pleas before the Hon. Joseph W. Martin, judge of the Pulaski circuit court, on the 3d day of June, 1887, in the case of—

JOHN W. BEIDELMAN, Plaintiff,
v.
R. K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Trustees, Defendants.

Complaint.

The plaintiff states that the defendants are and for ten days last past have been the legal owners and in possession of the railroad in this State running from Little Rock to a point on the Mississippi river opposite Memphis, Tennessee, commonly known as the Memphis & Little Rock railroad, which railroad is more than one hundred miles long, and which railroad during the time aforesaid has

been operated by defendants, who claim and operate said road as trustees for certain mortgage creditors of an insolvent company called the Memphis & Little Rock Railroad Company, as reorganized.

That Lonoke is a station on said railroad, distant from Little Rock only 23 miles, and that on the 5th day of May aforesaid the plaintiff, desiring to be transported on said railroad as a passenger from Little Rock, a terminal station on said road, to Lonoke, applied to the station agent of said railroad at Little Rock for a ticket on said road from Little Rock to Lonoke and tendered seventy cents therefor, but said station agent, at the instance and under the direction of defendants, refused to accept 70 cents and charged, demanded, exacted, and received from the plaintiff the sum of $1.30 for such ticket, and defendants refused to carry plaintiff for any less, and plaintiff was thereby compelled to pay and did pay to defendants the sum of $1.30 aforesaid as compensation for transporting him from Little Rock to Lonoke, contrary to the statutes in such case made and provided and to the damage of plaintiff $300.

Wherefore he prays judgment for $300 and for other relief.

W. S. McCAIN,
For Pl'ff.

Proceedings May 12th, 1887.

Come the defendants, by U. M. & G. B. Rose, their attorneys, and by leave of court file their answer herein.

Answer.

I. The defendants are operating the said Memphis & Little Rock railroad under and by virtue of the charter granted to the Memphis & Little Rock Railroad Company by the State of Arkansas in the act of the General Assembly of said State, approved January 11, 1853, under the provisions of which the defendants are authorized to charge for transportation of passengers at the rate of five cents per mile.

4 II. Said railroad was completed and a great part of it constructed upon the faith of the act of the General Assembly of the State of Arkansas, approved July 23d, 1868, which provides that the rates of toll shall not be decreased, without the railroad company's consent, to such an extent that the profits of the railroad company shall be less than fifteen per cent. per annum, and under the provisions of the act relied upon by plaintiff the profits of the said road would be greatly less than that rate, and no such reduction of rates has been consented to by these defendants or by any person or corporation who has ever been in possession of said road.

III. The expense of construction of the railroad now operated by the defendants was about the sum of four million dollars, and it is now mortgaged for two million eight hundred and fifty thousand dollars, bearing interest at the rate of eight per cent. per annum, and these defendants are in possession of the said railroad as the trustees and representative of the said mortgage bondholders. Under the provisions of the act relied upon by plaintiff the profits of the

road will not exceed the sum of fifty-eight thousand dollars per annum, which will be less than one and one-half per cent. upon the cost of constructing the railroad, and only a little over two per cent. upon the amount of its bonded indebtedness.

That its income before the passage of said act amounted to one hundred and sixty-two thousand dollars net, and the act, if enforced, will operate as an almost complete confiscation of the defendants' property.

U. M. & G. B. ROSE.

I say that I am an agent of the defendants, who are non-residents of this State, and that the statements contained in the foregoing answer are true to the best of my knowledge and belief.

D. MILLER.

Subscribed and sworn to before me this 11th day of May, 1887.

[SEAL.] GEO. E. DODGE,
Notary Public.

Judgment.

Proceedings, June 3d, 1887.

Now on this day came said plaintiff, by W. S. McCain, his attorney, and also came said defendants, by U. M. & G. B. Rose, their attorney, and this cause having been submitted to the court sitting as a jury on the agreed statement of facts, the court, after hearing the argument of counsel, finds for the plaintiff, and assesses a penalty of fifty dollars against said defendants in favor of said plaintiff, and also allows to the plaintiff a counsel fee of twenty-five dollars.

Wherefore it is now by the court considered, ordered, and adjudged that the plaintiff do have and recover of the said defendants the sum of seventy-five dollars aforesaid, together with all costs in and about this suit expended; and during the trial of this cause said defendants excepted to divers rulings of the court, and in order to save said exceptions asked and obtained leave to present and file here their bill of exceptions at any time during the present term of court.

Filing Bill Ex.

Proceedings, June 3d, 1887.

On this day came said defendants and filed their motion for a new trial in this cause, which said motion being submitted to the court is overruled; to which ruling of the court the defendants excepted, and to save their exceptions taken during these proceedings they present here their bill of exceptions, which, being found correct, is signed, sealed, filed, and made part of the record herein. Said defendants pray an appeal to the Supreme Court, which is granted.

(For copy of motion for new trial, see page 15.)

5 *Bill of Exceptions.*

Be it remembered that on the trial of this cause the case was sub-

mitted to the court, sitting as a jury, on an agreed statement of facts, which is as follows:

The Memphis & Little Rock Railroad Company was incorporated under the act of the General Assembly of the State of Arkansas, approved January 11th, 1853, which act is taken as a part hereof. See acts of 1852, p. 130.

On May 1, 1860, it mortgaged its property to Sam. Tate, Robert C. Brinckley, and Geo. C. Watkins, trustees.

On March 1, 1871, it executed a second mortgage on its property and charter to Henry F. Vail, as trustee.

On the 17th of March, 1873, this second mortgage was foreclosed by sale under the power, and the purchasers, on Nov. 17th, 1873, organized a new company under the charter, which they called the Memphis & Little Rock Railway Company.

On Dec. 1, 1873, the Memphis & Little Rock Railway Company mortgaged its charter and property to certain trustees. This mortgage not being paid at maturity, the trustees thereunder brought suit in the United States circuit court for the eastern district of Arkansas for its foreclosure, and the trustees in the mortgage of May 1, 1860, were, on their own application, made parties complainant; and on Nov. 21, 1876, a final decree was entered in the cause directing the foreclosure of both mortgages and a sale for their satisfaction.

On April 27, 1877, the mortgaged property was sold under the decree, including the charter, and the purchasers at the sale organized under the charter and called the new company the Memphis & Little Rock Railroad Company, as reorganized.

On May 1 and 2, 1877, the said last-named company issued bonds and executed to the defendants its mortgage upon its property and charter, and, default having been made in their payment, the defendants are in possession as trustees for the mortgage bondholders.

The legal right of the successive companies to organize under the old charter is not admitted.

The railroad was built, prior to 1868, from Memphis to Madison and from Little Rock to Du Vall's Bluff. It was built through the intervening distance in 1869. The expense of constructing the Memphis & Little Rock railroad was four millions of dollars, and the railroad company has a bonded indebtedness of two millions eight hundred and fifty thousand dollars, bearing interest at eight per cent. per annum; and the defendants are in possession as the representatives of the mortgage bondholders, default having been made in the payment of interest on the bonds. The net income of the road for the year 1886 was one hundred and sixty-two thousand dollars, earned principally from passenger traffic, the charge for transportation having been five cents per mile; and this has been about the average for recent past years. With the same traffic that the road has now, and charging for transportation at the rate of three cents per mile, the net income will only be fifty-eight thousand dollars per annum, which will pay less than one and one-half per cent. on the cost of the road, and only a little over two per cent. on its bonded indebtedness. The defendants do not anticipate any in-

crease of traffic on account of the reduction, for the reason that the St. Louis, Iron Mountain & Southern railway, from which the Memphis & Little Rock railroad derives nearly all of its through business, is building a parallel branch from Bald Knob, in the State of Arkansas, to the city of Memphis, and, being a hostile and rival line to that of these defendants, will carry over that branch the through passengers who would otherwise go over the road of the defendants. The most profitable traffic has been the through traffic, and the defendants anticipate a great diminution in their present traffic when said branch is completed, and it will, to all appearances, be completed during the summer of 1887.

The length of the defendants' road is one hundred and
6 thirty-five miles. Forty miles of that distance, from Madison to Memphis, is through a swamp in which there are virtually no inhabitants and which is subject to overflow.

Either party may refer to the statements in reference to the railroads in Arkansas contained in Poor's Railroad Manual for 1886, and the same shall be taken as evidence of the facts therein stated.

The cost of constructing the Batesville & Brinkley road from Brinkley to Newport, a distance of sixty miles, has been three hundred and seventy-five thousand dollars. Its rate of transportation before the act of 1887 was five cents per mile. Its length is sixty miles.

The Arkansas & Louisiana railroad is twenty-five miles long and its cost one hundred and eighty thousand dollars.

It is further agreed that in Arkansas money is now and has been for twenty years past lending currently at interest from six to ten per cent. per annum.

May 21, 1887.

W. S. McMAIN, *for Pl'ff.*
U. M. & G. B. ROSE,
For Defendants.

The following facts, as shown by Poor's Manual of Railroads for 1886, were introduced in evidence under the agreed statement of facts.

Facts from Poor's Manual.

Net earnings of Batesville & Brinkley railroad for 1885, $29,163.25.

Net earnings of the Arkansas & Louisiana railroad for 1885, $34,429.88.

Length of St. Louis, Iron Mountain & Southern railway, 923 miles. Mortgaged for $35,564,352.61; 5, 7, and 8 per cent. Net earnings, $3,619,416.63. Rate of charges has been three cents per mile.

Length of the Little Rock & Fort Smith railroad, 165 miles. Mortgaged for $2,379,500; 7 per cent. Net profits, $225,910.31. Rate of charges has been five cents per mile.

Length of the Little Rock, Mississippi River & Texas railway, 162 miles. Mortgaged for $2,977,500; 7 per cent. Net earnings, $99,604.44. Rate of charges has been five cents per mile.

Length of the St. Louis, Arkansas & Texas railway, 735.21 miles. Mortgaged for $18,375,000; 6 per cent. Net earnings, $67,644.30.

Length of St. Louis & San Francisco railroad, 814.88 miles. Mortgaged for $26,026,000. Net earnings, $2,573,772.70.

Length of Kansas City, Springfield & Memphis railway, 281.94 miles. Mortgaged for $7,800,000; 6 per cent. Net earnings, $365,160.88.

No other testimony was introduced. The court, therefore, found the facts to be as before agreed and as shown from said extracts from Poor's Manual.

On the trial of said cause said defendants asked the court to make the following—

7 *Declarations of Law.*

First. The act of the General Assembly of the State of Arkansas, being an act entitled "An act to regulate the rates and charges for the carriage of passengers by railroads," approved April 4, 1887, in so far as it relates to the present proceeding, is unconstitutional, null, and void, because, under the guise of regulating charges for the carriage of passengers on railroads, it amounts virtually to the confiscation of the property of the railroad in the hands of said defendants, and is an unreasonable, unjust, and oppressive taking of private property for public uses without compensation in violation of the Constitution of the State of Arkansas and that of the United States.

Second. That the said act of the General Assembly is unconstitutional because it is special legislation and makes arbitrary discriminations between different railroads, not based either upon their value, their earnings, or other valid grounds, but based simply on the respective lengths of the several railroads.

Third. That there is no legal evidence that said act was ever passed by said General Assembly and approved by the Governor of the State in the manner required by the constitution, and that, therefore, said act is null and void.

Fourth. That upon said findings of fact the judgment of the court should be for the defendants.

But the court refused to make either of said declarations of law, and to its refusal to give each one of them the defendants at the time excepted, and to save their exceptions asked and obtained leave to file their bill of exceptions at any time during the present term of the court.

And now, on the same day, the said defendants filed in court here their motion for a new trial, which is in words as follows:

"Motion for New Trial."

Come said defendants and ask the court to grant them a new trial herein, because—

First. The court erred in refusing to make the first declaration of law asked for by the defendants.

Second. The court erred in refusing to make the second declaration of law asked for by the defendants.

Third. The court erred in refusing to make the third declaration of law asked for by the defendants.

Fourth. The court erred in refusing to make the fourth declaration of law asked for by the defendants.

U. M. & G. B. ROSE,
For Defendants.

And the court, after considering said motion for a new trial, overruled the same, to which ruling the defendants at the time excepted, and to save their exceptions they present here their bill of exceptions, which being examined and found correct, it is signed, sealed, and ordered to be filed on this third day of June, 1887.

JOSEPH W. MARTIN,
Judge of Sixth Judicial Circuit of Arkansas.

8 STATE OF ARKANSAS, *County of Pulaski:*

I, W. W. Field, clerk of the circuit court of the county aforesaid, do hereby certify that the annexed and foregoing sixteen pages contain a true and correct transcript of the record and papers of said circuit court in the cause and for the dates therein recited.

Witness my hand and the seal of the court aforesaid this 9th day of June, A. D. 1887.

[SEAL.]

W. W. FIELD,
Clerk of Pulaski Circuit Court,
By S. J. JOHNSON, *D. C.*

Costs of W. W. Field, clerk	$5 35
" transcript	4 00
	$9 35

Endorsed: Filed June 11th, 1887. W. P. Campbell, clerk.

Proceedings in Supreme Court of Arkansas.

JUNE 11TH, 1887.

Come the appellants, by their attorneys, and by leave of the court file their motion to advance and submit this cause for hearing as one involving the public interests.

Said motion, with the accompanying agreement of counsel, is as follows:

Motion to Advance.

Come said appellants and show that this cause is one that involves an important public interest, and they therefore pray that it may be advanced and submitted at an early day.

U. M. & G. B. ROSE,
For Appellants.

We agree that this cause be advanced as one involving the public interest and pray that it may be so advanced.

June 11th, 1882.

U. M. & G. B. ROSE,
For Appellants.
W. S. McCAIN,
For Appellee.

Endorsed: Filed June 11, 1887. W. P. Campbell, clerk.

Motion to Advance Overruled.

JUNE 18TH, 1887.

On consideration it is ordered by the court that the motion to advance this cause as one involving the public interests be, and the same is hereby, denied.

Submission.

SATURDAY, *July 25th*, 1887.

Come the appellants and appellees, by attorneys, and upon motion this cause is submitted upon the briefs filed and by the court taken under advisement.

Final Judgment.

R. K. Dow *et al.*, Trustees M. & L. R. R. R. Co., Appellants,
v.
JOHN W. BEIDELMAN, Appellee.

Appeal from Pulaski circuit court.

SATURDAY, *July 9th*, 1887.

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski county and was argued by counsel; on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed, with costs.

It is further considered that said appellee recover of said appellants all his costs in this court in this cause expended and have
9 execution thereof.

SATURDAY, *July 9th*, 1887.

Comes the appellee, by attorney, and by leave of the court files his motion to tax an attorney's fee in this cause.

Said motion is as follows:

Motion to Tax Att'y's Fee.

Plaintiff, and also his attorney, W. S. McCain, moves the court to tax and allow an attorney's fee of $100 for the services of said attorney in this court.

Endorsed: Filed July 9th, 1887. W. P. Campbell, clerk.

The following opinion was delivered by the court:

Opinion.

SMITH, *J.:*

The complaint alleged that the defendants were the legal owners and in possession of the Memphis & Little Rock railroad, which is more than one hundred miles long; that on the fifth of May, 1887, the plaintiff had applied to the ticket agent of defendants for a passenger ticket from Little Rock to Lonoke and had tendered seventy cents in payment, the distance between the two stations being twenty-three miles; but the defendants had refused to carry for that sum, and had demanded and received from him one dollar and thirty cents for the service aforesaid.

Wherefore the plaintiff claimed the statutory penalty.

The defendants filed the following answer:

I.

"The defendants are operating the said Memphis & Little Rock railroad under and by virtue of the charter granted to the Memphis & Little Rock Railroad Company by the State of Arkansas, in the act of the General Assembly of said State, approved January 11, 1853, under the provisions of which the defendants are authorized to charge for transportation of passengers at the rate of five cents per mile.

II.

"Said railroad was completed and a great part of it constructed upon the faith of the act of the General Assembly of the State of Arkansas, approved July 23, 1868, which provided that the rates of toll shall not be decreased, without the railroad company's consent, to such an extent that the profits of the railroad company shall be less than fifteen per cent per annum; and under the provisions of the act relied upon by plaintiff the profits of said road would be greatly less than that rate, and no such reduction of rates has been consented to by these defendants or any person or corporation who has ever been in possession of said road.

III.

"The expense of the construction of the railroad now operated by the defendants was about the sum of four millions of dollars, and it is now mortgaged for two millions eight hundred and fifty thousand dollars, bearing interest at the rate of eight per centum per annum, and these defendants are in possession of said railroad as the trustees and representatives of the said mortgage bondholders. Under the provisions of the act relied upon by the plaintiff the profits of the road will not exceed the sum of fifty-eight thousand dollars per annum, which will be less than one and one-half per cent. upon the cost of constructing the railroad, and only a little over two per cent. upon the amount of its bonded indebted-

ness; that its income before the passage of said act amounted to one hundred and sixty-two thousand dollars, net, and the act, if enforced, will operate as an almost complete confiscation of the defendants' property."

The cause was submitted to the court sitting as a jury, and judgment was rendered in favor of plaintiff for seventy-five dollars and costs.

Defendants filed a motion for a new trial, which was overruled, upon which they excepted and appealed.

A jury having been waived, the cause was tried before the court and the facts were agreed as follows:

The Memphis & Little Rock Railroad Company was incorporated under the act of the General Assembly of the State of Arkansas, approved January 11, 1853, which act is taken as a part hereof. See acts of 1852, p. 130.

On May 1, 1860, it mortgaged its charter and property to Sam. Tate, Robert C. Brinkley, and Geo. C. Watkins, trustees.

On March 1, 1879, it executed a second mortgage on its property and charter to Henry F. Vail, as trustee.

On the 17th of March, 1873, this second mortgage was foreclosed by sale under the power, and the purchasers, on November 17th, 1873, organized a new company under the charter, which they called the Memphis & Little Rock Railway Company.

On December 1, 1873, the Memphis & Little Rock Railway Company mortgaged its charter and property to certain trustees. This mortgage not being paid at maturity, the trustees thereunder brought suit in the United States circuit court for the eastern district of Arkansas for its foreclosure, and the trustees in the mortgage of May 1, 1860, were, on their own application, made parties complainant, and on November 21, 1876, a final decree was entered in the cause directing the foreclosure of both mortgages and a sale for their satisfaction.

On April 27th, 1877, the mortgaged property was sold under the decree, including the charter, and the purchasers at the sale reorganized under the charter and called the new company the Memphis & Little Rock Railroad Company, as reorganized.

On May 1 and 2, 1877, the said last-named company issued bonds and executed to the defendants its mortgages upon its property and charter, and default having been made in their payment the defendants are in possession as trustees for the mortgage bondholders.

The legal right of the successive companies to reorganize under the old charter is not admitted.

The railroad was built, prior to 1868, from Memphis to Madison and from Little Rock to Duvall's Bluff. It was built through the intervening distance in 1869.

The expense of constructing the Memphis & Little Rock railroad was four millions of dollars, and the railroad company has a bonded indebtedness of two millions eight hundred and fifty thousand dollars, bearing interest at eight per cent. per annum, and the defendants are in possession as the representatives of the mortgage bondholders, default having been made in the payment of the interest on the

11 bonds. The net income of the road for the year 1886 was one hundred and sixty-two thousand dollars, earned principally from passenger traffic, the charge for transportation having been five cents per mile, and this has been about the average for recent past years. With the same traffic that the road has now, and charging for transportation at the rate of three cents per mile, the net income will only be fifty-eight thousand dollars per annum, which will pay less than one and one-half per cent. on the cost of the road and only a little over two per cent. on its bonded indebtedness. The defendants do not anticipate any increase of traffic on account of the reduction, for the reason that the St. Louis, Iron Mountain & Southern railway, from which the Memphis & Little Rock railroad derives nearly all of its through business, is building a parallel branch from Bald Knob, in the State of Arkansas, to the city of Memphis, and this, being a hostile and rival line to that of these defendants, will carry over that branch the through passengers who would otherwise go over the road of the defendants. The most profitable traffic has been the through traffic, and the defendants anticipate a great diminution in their present traffic when said branch is completed, and it will, to all appearances, be completed during the summer of 1887.

The length of the defendants' road is one hundred and thirty-five miles. Forty miles of that distance, from Madison to Memphis, is through a swamp, in which there are virtually no inhabitants, and which is subject to overflow.

Either party may refer to the statements in reference to the railroads in Arkansas contained in Poor's Railroad Manual for 1886, and the same shall be taken as evidence of the facts therein stated.

Then follow details as to the length, cost of construction, net earnings, bonded indebtedness, and rate of charges of the principal railroads in the State.

No other testimony was introduced, and the defendants moved the following declarations of law:

First. The act of the General Assembly of the State of Arkansas, being an act entitled "An act to regulate the rates and charges for the carriage of passengers by railroads," approved April 4th, 1887, in so far as it relates to the present proceeding, is unconstitutional, null and void, because, under the guise of regulating charges for the carriage of passengers on railroads, it virtually amounts to the confiscation of the property of the railroad in the hands of these defendants, and is an unreasonable, unjust, and oppressive taking of private property for public uses without compensation in violation of the Constitution of the State of Arkansas and that of the United States.

Second. That the said act of the General Assembly is unconstitutional because it is special legislation and makes arbitrary discriminations between different railroads, not based either upon their value, their earnings, or other valid grounds, but based simply on the respective lengths of the several railroads.

Third. That there is no legal evidence that said act was ever passed by said General Assembly and approved by the Governor of

the State in the manner required by the Constitution, and that, therefore, said act is null and void.

Fourth. That upon said findings of fact the judgment of the court should be for the defendants.

But the court refused to make either of said declarations of law, and to its refusal to give each one of them the defendants at the time excepted and saved their exceptions in the proper form.

12 The act provides a maximum schedule of charges for the transportation of passengers as follows: On lines of railroad fifteen miles or less in length, eight cents per mile; on lines over fifteen and less than seventy-five miles in length, and on lines exceeding seventy-five miles in length, three cents per mile; and it further provides that any corporation, officer of court, trustee, person or association of persons operating a railroad in this State who shall charge or take any greater compensation for the carriage of passengers shall forfeit and pay for every such offence not less than fifty nor more than three hundred dollars, to be recovered by action by the party aggrieved in any court of competent jurisdiction. Acts of 1887, p. 227.

It is denied that this law was enacted in accordance with the forms prescribed by the constitution. It appears that the act was regularly passed by both houses of the General Assembly, but in its enrollment two provisions which had been reported by a conference committee and incorporated in the act by way of amendment were omitted. In this form it was sent to the Governor and was by him approved on March 30. The next day the General Assembly adjourned. After the adjournment the omissions were discovered. A correct enrollment was then made, and the bill, signed by the president of the Senate and speaker of the House, was again laid before the Governor, who approved it on April 4.

The first presentation and approval were of no validity, because it was not the same bill that had been passed by the Legislature. Smithee *vs.* Campbell, 41 Ark., 471.

The question, then, is resolved into this: Whether a bill that has passed both houses may be submitted to the Governor for his approval after the adjournment of the Legislature, or whether it must be presented to him while the legislative body is still in session. The constitution ordains that every such bill shall be presented to the Governor. If he approve it he shall sign it, but if he shall not approve it he shall return it, with his objections, to the house in which it originated, which house shall proceed to reconsider it.

"If any bill shall not be returned by the Governor within five days, Sundays excepted, after it shall have been presented to him the same shall be a law in like manner as if he had signed it, unless the General Assembly by their adjournment prevent its return, in which case it shall become a law, unless he shall file the same, with his objections, in the office of the secretary of state, and give notice thereof by public proclamation within twenty days after such adjournment." Const., art. 6, sec. 15.

Nothing in this language implies that all bills must be transmitted to the Governor before the adjournment of the Assembly.

He is prevented by the adjournment from returning the bill, whether the bill is in his hands before it adjourns or reaches his hands afterwards. The term of members does not expire when it adjourns, nor do all the functions and powers of its officers then cease. It may often happen in the case of bills passed in the closing hours of a session that there is not sufficient time to enroll them properly and present them to the Executive before an adjournment takes place. The effect is not that, under the circumstances, the bill fails to become a law. Our constitutional provision differs materially in this respect from section 7 of article 1 of the Constitution of the United States.

The power of the Legislature to regulate the charges of common carriers, unless restrained by contract, or unless what is done amounts to a regulation of foreign or interstate commerce, is not open to controversy. The power has been exercised for near two hundred years. Railroad Commission Cases, 116 U. S., 325, 13 and cases there cited.

It is contended, however, that by the charter of the Memphis & Little Rock Railroad Company the exclusive power of regulating its tolls for the transportation of passengers was conceded to that corporation. The sixth section of the charter did, indeed, provide that the charge of transportation should not exceed five cents a mile for every passenger. This is very far from being a contract on the part of the State that passenger fare should never be reduced below that rate; but even if it had been, it was decided in M. & L. R. R. R. Co. *v.* Berry, 41 Ark., 436, affirmed on error 112 U. S., 609, under the style of Memphis and Little Rock R. Co. *v.* Railroad Commissioners, that the privileges conferred by the charter on the original company did not pass to the purchasers at a mortgage foreclosure sale, who subsequently reorganized as a railroad company, notwithstanding the mortgage purported to transfer the charter. Such reorganization did not take place until the year 1877, after the adoption of the present constitution, which enjoins upon the General Assembly to pass laws to prevent excessive charges by railroad companies for transporting freight and passengers and to enforce such laws by adequate penalties and forfeitures. Art. XVII, sec. 10.

In reply to the suggestion that the earnings of the road will be reduced by the charge to the point of confiscation, we have seen that the new corporation which issued bonds and executed the mortgages under which the defendants are now in possession came into existence, subject to legislative control. Such being the case, it was competent for the Legislature to fix a maximum, beyond which any charge would be unreasonable, and such maximum would be binding on the courts, as well as the parties. Munn *v.* Illinois, 94 U. S., 113.

And even if the ultimate determination of the reasonableness of rates of carriage is with the courts and not the Legislature we cannot say from anything that is contained in this record or judicially known to us that a statute which prescribes a compensation of three cents a mile for carrying passengers works such a crying injustice to the defendants as to call for judicial interference.

It is further objected that the act is special legislation and makes arbitrary discriminations. These objections are sufficiently answered in C., B. & Q. R. Co. *v.* Iowa, 94 U. S., 155, where a similar statute was under consideration.

The statute dividing railroads into classes according to their length operates uniformly on each class, and this is all that is required. L. R. & Ft. S. R'y *v.* Hanniford, 49 Ark.

Judgment affirmed.

14 *Am't of Bond.*

Supreme Court of Arkansas.

R. K. Dow *et al. v.* J. W. Beidelman.

The amount of the supersedeas bond on writ of error to the Supreme Court of the United States in this case is hereby fixed at five hundred dollars, and the bond of said plaintiff in error in that amount being presented, with Rudolph Fink as surety, the same is approved; and it is ordered that upon its being filed with the clerk of the court a supersedeas issue.

STERLING R. COCKRILL,
Chief Justice Sup. Court Ark's.

Supersedeas Bond.

Know all men by these presents that we, the undersigned, are held and firmly bound unto J. W. Beidelman in the penal sum of five hundred dollars:

Yet upon condition that whereas said R. K. Dow, Watson Matthews, and Charles Moran have sued out a writ of error for the reversal of a judgment rendered against them in favor of said Beidelman by the supreme court of the State of Arkansas, and a citation has been issued directing the said Beidelman to appear at the Supreme Court of the United States to be held at Washington on the second Monday of October next:

Now, if said Dow, Matthews, and Moran shall prosecute their said writ of error to effect and answer all damages and costs that may be adjudged against them if they fail to make their plea good, then the above obligation to be void; else to remain in full force.

Witness our hands this — day of July, 1887.

R. K. DOW,
WATSON MATHEWS, &
CHAS. MORAN, *Trustees,*
By U. M. & G. B. ROSE, *Att'ys.*
RUDOLPH FINK.

I say that I am worth the sum of five hundred dollars in real estate in the State of Arkansas, subject to execution over and above all my debts and exemptions.

RUDOLPH FINK.

Subscribed and sworn to before me this 25th day of July, 1887.

[L. S.] M. A. COHN,
Notary Public.

Filed August 3d, 1887.

W. P. CAMPBELL, *Clerk*,
By P. D. ENGLISH, *D. C.*

15 *Assignment of Errors.*

In the Supreme Court of Arkansas.

R. K. Dow *et al. vs.* J. W. BEIDELMAN.

First. The court erred in holding that the act of the General Assembly of the State of Arkansas entitled "An act to regulate the rates of charges for the carriage of passengers by railroads," approved April 4th, 1887, was not repugnant to that clause of the 14th amendment to the Constitution of the United States which provides that "No State * * * shall deprive any person of life, liberty, or property without due process of law."

Second. That the court erred in holding that said act was not repugnant to that clause of the 14th amendment to the Constitution of the United States which declares that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

U. M. & G. B. ROSE.

Filed July 14th, 1887.

W. P. CAMPBELL, *Clerk.*

16 STATE OF ARKANSAS:

In the Supreme Court.

I, William P. Campell, clerk of the supreme court of the State of Arkansas, do hereby certify that the foregoing fifteen pages of manuscript hereto annexed contain a full, true, and complete transcript of all the papers and record entries of said court in the case of R. K. Dow *et al.*, trustees of the Memphis & Little Rock Railroad Company, *vs.* John W. Beidelman, as the same appear of record and now on file in said court.

In testimony whereof I have hereto set my hand and affixed the seal of said supreme court, at the city of Little Rock, Arkansas, this the 6th day of August, A, D. 1887.

[Seal of the Supreme Court of Arkansas.]

W. P. CAMPBELL,
Clerk of the Supreme Court of Arkansas.

Transcript & fees, $15.00, paid by pl't'ff in error.

W. P. CAMPBELL, *Cl'k.*
P. D. ENGLISH, *D. C.*

Endorsed on cover: Arkansas sup. court. No. 1001. R. K. Dow, Watson Matthews, and Charles Moran, plaintiffs in error, *vs.* J. W. Beidelman. Filed August 11, 1887.

125-680

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JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

R. K. DOW, WATSON MATTHEWS AND CHARLES MORAN, TRUSTEES,

v.

J. W. BEIDELMAN.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

U. M. ROSE.

Press Printing Company, Little Rock, Ark.

IN THE SUPREME COURT OF THE UNITED STATES.

R. K. DOW, WATSON MATTHEWS AND CHARLES MORAN, TRUSTEES,

v.

J. W. BEIDELMAN.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The defendant in error brought suit against the plaintiffs in error for the statutory penalty allowed by the act of the General Assembly of the State of Arkansas, of April 4, 1887, alleging that said plaintiffs in error were trustees operating the Memphis and Little Rock Railroad, and had charged the defendant in error more than three cents per mile for a ticket from Little Rock, in the State of Arkansas, to Lonoke in said State. (Rec. 3.)

The material parts of the act under which the suit was brought are as follows:

"SECTION 1. That the maximum sum which any corporation, officer of court, trustee, person or association of persons, operating a line of railroad in this State, shall be authorized to charge and collect for carrying each passenger over such line within this State, in the manner known as first class passage, is hereby fixed at the following named rates: On lines of railroad fifteen miles or less in length, eight cents per mile; on lines over fifteen miles in length and less than seventy-five miles in length, five cents; on lines over seventy-five miles in length three cents per mile.

"The number of miles in any railroad shall be held to include the entire length of said railroad, whether wholly within the State or extending beyond the limits thereof. And any branch railroad operated by any person or corporation operating the main line shall be held to constitute a part of said main line for the purpose of determining the length of said main line for the purposes of this act.

"SEC. 3. Any of the persons or corporations mentioned in Section 1 that shall charge, demand, take or receive, from any person or persons aforesaid, any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit or pay for every such offense any sum not less than fifty dollars nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard, on original action, by appeal, or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction."

Acts Ark., 1887, p. 227.

The defenses relied upon by the plaintiffs in error, material now to be considered, were: 1st—That the rates prescribed by the act were unreasonably low, and amounted to a virtual confiscation of their property; and 2d—That the act deprived them of the equal protection of the laws. (Rec. 3.)

The case was submitted on an agreed statement of facts, the material parts of which are as follows:

"The plaintiffs in error are operating the Memphis and Little Rock Railroad, which was constructed under a charter granted by the State of Arkansas, January 11, 1853, as trustees for mortgage bondholders.

"The company had executed four mortgages, which had been foreclosed, and the company had been re-organized three times since the building of the road; and the plaintiffs in error hold under a mortgage executed by the last of the companies—called the Memphis and Little Rock Railroad Company, as reorganized.

"The expense of constructing the railroad was four million of dollars, and its bonded indebtedness amounts to two million eight hundred and fifty thousand dollars, bearing interest at eight per cent per annum, and the plaintiffs in error hold as the representatives of the bondholders, default having been made in the payment of interest on the bonds. The net income of the road for the year 1886 was $162,000, earned principally from passenger traffic, the charge for transportation having been five cents per mile; and this has been about the average income for recent past years. With the same traffic that the road has now, and charging for transportation at the rate of three cents per mile, the net income will only be

$58,000 per annum, which will pay less than one and one-half per cent on the cost of the road, and only a little over two per cent on its bonded indebtedness. The plaintiffs in error do not anticipate an increase in traffic on account of the reduction, for the reason that the St. Louis, Iron Mountain and Southern Railway, from which the Memphis and Little Rock Railroad derives nearly all of its through business, is building a parallel branch from Bald Knob, in the State of Arkansas, to the City of Memphis, and that being a hostile and rival line to that of the plaintiffs in error, will carry over that branch the through passengers who would otherwise go over the road of the plaintiffs in error. The most profitable traffic has been the through traffic, and the plaintiffs in error anticipate a great diminution in their present traffic when said branch is completed, and it will, to all appearance, be completed during the summer of 1887. The length of the road of the plaintiffs in error is one hundred and thirty-five miles; forty miles of that distance, from Madison to Memphis, is through a swamp in which there are virtually no inhabitants, and which is subject to overflow. Either party may refer to the statements in reference to the railroads in Arkansas contained in Poor's Railroad Manual for 1886, and the same shall be taken as evidence of the facts therein stated.

"The cost of constructing the Batesville and Brinkley Railroad, from Brinkley to Newport, a distance of sixty miles, has been $375,000. Its rate of transportation before the Act of 1887 was five cents per mile. Its length is sixty miles.

"The Arkansas and Louisiana Railroad is twenty-five miles long, and its cost $180,000.

"Money in Arkansas is now, and has been for twenty years past, lending currently at interest from six to ten per cent per annum."

The following facts, as shown by Poor's Manual of Railroads for 1886, were introduced in evidence under the agreed statement of facts:

"Net earnings of the Batesville and Brinkley Railroad for 1885, $29,163.25.

"Net earnings of the Arkansas and Louisiana Railroad for 1885, $34,429.88.

"Length of St. Louis, Iron Mountain and Southern Railway, 923 miles. Mortgaged for $35,561,352.61—seven, eight and five per cent. Net earnings, $3,619,416.63. Rate of charges has been three cents per mile.

"Length of Little Rock and Fort Smith Railway, 165 miles. Mortgaged for $2,375.500—seven per cent. Net profits, $225,910.31. Rate of charges has been five cents per mile.

"Length of Little Rock, Mississippi River and Texas Railway, 162 miles. Mortgaged for $2,977,500—seven per cent. Net earnings, $99,601.44. Rate of charges has been five cents per mile.

"Length of St. Louis, Arkansas and Texas Railway, 735.21 miles. Mortgaged for $18,375,000—six per cent. Net earnings, $67,644.30.

"Length of St. Louis and San Francisco Railroad, 814.88 miles. Mortgaged for $26,026,000. Net earnings $2,573,772.70.

"Length of Kansas City, Springfield and Memphis Railway, 281.94 miles. Mortgaged for $7,800,000—six per cent. Net earnings, $365,160.88." (Rec. 6, *et seq.*)

This was all the evidence now material.

The plaintiffs in error asked the following declarations of law:

"1. The Act of the General Assembly of the State of Arkansas, entitled, "An Act to regulate the rates charged for the carriage of passengers by railroads," approved April 4, 1887, in so much as it relates to the present proceeding is unconstitutional, null and void; because, under the guise of regulating charges for the carriage of passengers on railroads, it amounts virtually to the confiscation of the property of the railroad in the hands of said defendants, and is an unreasonable, unjust and oppressive taking of private property for public uses without compensation, in violation of the Constitution of the State of Arkansas, and of the United States.

"2. That said Act of the General Assembly is unconstitutional, because it is special legislation, and makes arbitrary discriminations between different railroads, not based either upon their value, their earnings, or other valid grounds; but simply on the respective lengths of the several railroads."

These were refused, and judgment was rendered against the plaintiffs in error. (Rec. 7.)

They appealed to the Supreme Court of the State, and the judgment of the Circuit Court being affirmed, on the ground, among others, that the Act in question was not in violation to the Fourteenth Amendment to the Constitution of

the United States, they have prosecuted this writ of error to reverse the judgment of the Supreme Court of Arkansas.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the Act of the General Assembly of the State of Arkansas, entitled, "An Act to regulate the rates charged for the carriage of passengers by railroad," approved April 4, 1887, is not repugnant to that clause of the Fourteenth Amendment to the Constitution of the United States which provides that "No State shall deprive any person of life, liberty or property without due process of law."

2. The court erred in holding that said Act was not repugnant to that clause of the Fourteenth Amendment to the Constitution of the United States, which declares that "No State shall . . . . . deny to any person within its jurisdiction the equal protection of the laws."

I.

The court erred in holding that the Act of the General Assembly of the State of Arkansas, entitled, "An Act to regulate the rates of charges for the carriage of passengers by railroad," approved April 4, 1887, was not repugnant to that clause of the Fourteenth Amendment to the Constitution of the United States which provides that "No State shall deprive any person of life, liberty or property without due process of law."

In the case of *Santa Clara County v. Southern Pacific Railroad Company, 118 U. S., 394,* it was decided by this court that corporations are protected by the Fourteenth Amendment to the same extent as individuals.

The cost of constructing the Memphis and Little Rock Railroad was four million of dollars. It is mortgaged for two million, eight hundred and fifty thousand dollars, bearing interest at the rate of eight per cent. It has been earning one hundred and sixty-two thousand dollars per year. Under the new Act its earnings will amount to only fifty-eight thousand dollars, which will pay less than one and one-half per cent on the cost of the road, and only a little over two per cent on the amount of the bonded indebtedness. Of course this is confiscation.

Any law which arbitrarily reduces the income of property to an amount which does not pay a reasonable interest on the investment is a taking of private property. If done for private advantage, it is unconstitutional in any case. If done for the public good, compensation must be made. If the Legislature thinks that it would be for the public welfare to have cheap fares, it no doubt has power to reduce them, provided it will pay to the railroads the difference between the earnings which they make under the Act and what would be a reasonable income from the property. If it will do this it can reduce fares to one cent per mile, or even abolish them altogether. But it cannot touch one particle of private property, however insignificant, without making compensation. If it could plunder a single citizen for the benefit of the public, there would be an end to civil liberty. Money invested in railroad property is no less under the constitutional guaranties than that invested in lands or cattle.

What is a reasonable compensation differs according to locality. In the State of Arkansas the record shows that the current rate of interest is from six to ten per cent, and the

Constitution provides that "When no rate of interest is agreed upon, the rate shall be six per cent per annum."

Ark. Const. 1874, Art. 19, Sec. 13.

This is a declaration in the organic act, that a person lending or investing money is fairly entitled to that rate of interest; and any legislation which arbitrarily reduces the income of property below that rate is a taking of property to that extent.

This court, in speaking of the legislative right to regulate the charges of railroads, say:

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law."

Railroad Commission Cases, 116 U. S., 331.

In the case of *Koehler, ex parte, 23 Fed. Rep., 529,* it was decided that:

"The power of the Legislature to alter or repeal the General Incorporation Act of Oregon is qualified so that it cannot thereby 'impair or destroy any vested right.'

"A railroad corporation formed under the General Incorporation Act of Oregon has a vested right to collect and

receive a reasonable compensation for the transportation of persons and property over its line, which the Legislature cannot impair or destroy.

"The Legislature may prescribe rates of transportation, and the same will be presumed to be reasonable until the contrary is shown, but the judiciary are the final judges of what is reasonable, or what impairs the vested rights of the corporation to a reasonable compensation for its services."

Mr. Cooley says: "And even a provision in a corporate charter, empowering the Legislature to alter, modify or repeal it, would not authorize a subsequent Act, which, on pretense of amendment, or of a police regulation, would have the effect to appropriate a portion of the property to the public use."

Cooley's Const. Lim., 578.

In *Miller v. New York & Erie Railroad Co., 21 Barb., 519,* the court say:

"The power reserved to the Legislature to alter, modify, or repeal the defendants' charter did not purport to authorize the assumption of their property without compensation. No power to do that could have been reserved, for none such could have existed. It would be preposterous to say that the Legislature has the power to make any and every requisition upon the defendants as a condition of their retaining their corporate existence. To require them, for instance, to make donations to towns through which their railroads may pass, or to any other body politic, or to individuals."

Mr. Morawetz says: "The power of the State to enact laws regulating the charges of railroad companies does not

enable it to fix charges which are less than reasonable. Such legislation would be unconstitutional."

2 Morawetz Corp., Sec. 1075 c.

Mr. Black, in his work on *Constitutional Prohibitions, Sec. 26*, says: "It is also to be remembered that the power of the State to regulate tolls and charges does not enable it to fix rates for public carriers which would be below a reasonable compensation. The necessity for promoting the public welfare and convenience does not extend beyond holding the charges of carriers within reasonable bounds. To still further reduce their sources of income on the plea of public advantage would amount to a confiscation of private property without warrant of law. It would appear from this that the ultimate determination of the reasonableness of rates of carriage is with the courts, not with the Legislature."

This is one of those self-evident propositions about which there has been and can be no conflict in the authorities. If the Legislature can compel railroads to carry persons or property at less than a reasonable compensation, it can compel them to carry them for nothing. If it can confiscate a part of their property it can confiscate the whole. If it can take away all but one and one-half per cent profit on their investment, it can take away all.

Nor can the State of Arkansas claim that it has the right to confiscate the property of the plaintiffs in error by virtue of any provision of its Constitution; for the provision upon the subject is as follows:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The

Dow vs Beidleman
125 U.S. 680.

General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or that may be hereafter created, whenever, in their opinion, it may be injurious to the citizens of the State, *in such manner, however, that no injustice shall be done to the corporators.*"

Const. Ark., 1874, Art. 12, Sec. 6.

It was upon the faith of this Constitutional provision that $2,800,000 was loaned to the Memphis and Little Rock Railroad Company as reorganized by the bondholders represented by the plaintiffs in error; and so far from there being any reservation in the organic act of the State subjecting the plaintiffs in error to the confiscation now attempted, they are, by the express provisions of that instrument, secured against injustice.

The agreed statement of facts shows that since the completion of this railroad, three successive corporations have owned and operated it, that all have failed to earn sufficient to pay the interest on their bonded debts, and that the plaintiffs in error are now in possession as trustees for bondholders, the interest on whose bonds is now in default. Charging at the rate of five cents per mile, no company has been able to earn sufficient to meet its obligations; and now it is attempted to reduce the rate to three cents, when it is shown the income of the road will not exceed one and one-half per cent upon the sum invested in its construction. To do this would be to destroy the property of the plaintiffs in error under the pretense of regulating its use.

As was decided by this court, in *Holyoke Co. v. Lyman, 15*

Wall., 500, the reservation by the State of the authority to alter or repeal a charter does not confer the power to defeat or essentially impair rights which have become vested under it.

II.

The court erred in holding that said act was not repugnant to that clause of the Fourteenth Amendment to the Constitution of the United States, which declares that "No State shall . . . . . deny to any person within its jurisdiction the equal protection of the laws."

This Act now before us is a flagrant violation of this provision. It divides railroads into three classes: First, those more than seventy-five miles in length, which are not allowed to charge more than three cents per mile; second, those more than twenty-five miles in length and less than seventy-five, which are allowed to charge five cents per mile; and third, those less than twenty-five miles long, which are allowed to charge eight cents.

It will be seen at a glance that this classification is purely arbitrary. It is not based upon the value of the roads, their earnings, or the number of their passengers. If it had been provided that all roads which at three cents per mile would earn as much as six per cent on the investment should carry at that rate, a different question would have been presented. But the standard fixed, based exclusively upon length, is without an intelligent foundation. There is no connection between the length of roads and their profits or the rate at which they can afford to carry passengers. A long road may be earning much less than a short one. It may run through a desolate country,

where the local traffic is insignificant, and its very length be a reason why it should be allowed to charge a higher rate than a short road between two important points, whose profits are large and whose expenses light. This is precisely the case with the Memphis and Little Rock Railroad. For forty miles it is built through a swamp in which there is not a human habitation. This part of the road contributes nothing to its income, and its maintenance costs twice as much as that of all the rest of the line. This additional length instead of being an advantage, is one of the greatest drawbacks to the prosperity of the road, and instead of causing a reduction of charges, is a reason for their augmentation. And so it is throughout the State. A glance at the facts disclosed by the record will show that it is the short lines that are profitable, and not the long ones. It will be seen that few of the long lines are earning as much as six per cent on the cost of their construction, while the short ones are earning from ten to twenty per cent. It would, therefore, have been more just to have provided that the short lines should charge no more than the three cents and that the long ones might charge eight. But the whole system is hopelessly vicious. The only discrimination that can be made among railroads must be based upon their value and their net earnings. Any other must be essentially arbitrary. There is no more reason to discriminate between railroads on account of their length than on account of the breadth of their guage, or the straightness or directness of their route. If the Legislature can divide railroads into three classes based upon their length, it can divide them into any number of classes, so as to have a different law apply to every railroad in the State.

They can thereby legislate out of existence any particular road against which they may have an aversion and legislate into wealth and prosperity any road in whose favor they may be. They would be as autocratic as the Russian Czar, dispensing ruin and fortune at will.

It is needless to say that no such power is conferred upon the legislative department; nor can any such power be granted as long as we remain under the protection of the Constitution of the United States, nor indeed as long as we remain under any civilized government which does not allow the weak to be plundered by the strong.

All discriminations between persons following the same pursuit must be based upon some substantial and sufficient difference.

In *U. S. v. Cruikshank, 92 U. S., 555*, this court says:

"The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power."

In *Missouri v. Lewis, 101 U. S., 31*, in defining the scope of the Fourteenth Amendment, it is said:

"It means that no person or class of persons shall be denied the same protection which is enjoyed by other persons or classes in the same place and under like circumstances."

In *Barbier v. Connolly, 113 U. S., 31*, it is said:

"The Fourteenth Amendment in declaring that no State shall deprive any person of life, liberty or property without

due process of law, nor deny to any person within its jurisdiction the equal protection of its laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for the like offenses."

In *Yick Wo v. Hopkins, 118 U. S., 368*, this court, after referring with approval to the language above quoted, and to the ordinance the validity of which was sustained in that case, proceeds:

"The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all of those in previous use, it divides the owners and occupiers into two classes, not having respect to their per-

sonal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their will and pleasure.

* * * * * * * * * *

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says, 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

* * * * * * * * * *

"When we consider the nature and theory of our principles of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere and in some person or body

the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

These cases clearly define the scope of the Fourteenth Amendment. It means that all persons, natural and artificial, rich and poor, citizens and aliens, shall be governed and protected by laws applicable to all alike. No preferences, no discriminations are to be suffered to exist. Whatever the status of the individual may be elsewhere, so long as he is within our territory he is to receive even-handed justice.

Is the law now before us an equal law? Does it bear equally upon all within its purview? We have seen that it does not; that it is arbitrary, based upon no foundation except the legislative will; oppressive to the roads which most

require indulgence, and lenient to those which are in prosperous circumstances.

The right of the Legislature to divide persons into classes for the purposes of legislation is not denied. It may pass laws for the special government of merchants, of farmers, of lawyers, of manufacturers; but such laws must be called for by the nature of their several pursuits, and must apply equally to all individuals of each class. It may divide towns into classes according to their size; for here the difference of population is an essential element, as the form of government which would suffice for a village, would be inadequate for a populous city.

In reference to the fares of railroads there can be no classification by the Legislature. It may provide that all roads whose earnings exceed a certain reasonable rate, shall carry passengers at three cents a mile; and the different roads would then classify themselves by their own earnings. This would be to govern them all by an equal law. It would prevent some railroads from making an extravagant profit at the expense of the public, and would not weigh down those whose business was unprofitable. But it is just as permissible to say that railroads over a certain length shall be governed by a law different from that governing shorter roads, as it would be to subject men over six feet high to one set of laws, and men under that height to another. Every excuse that can be given in the one case will apply to the other. If you say that the presumption is that a long road is stronger than a short one, and therefore better able to protect itself, it is just as true that a tall man is apt to be stronger and better able to

protect himself than a small one. But while every one would be shocked at the idea of passing laws for the protection of short men at the expense of their taller neighbors, the Legislature has been induced to pass a law for the protection of short roads, however prosperous, at the expense of long ones, however unfortunate. The one is as unjust as the other.

Many of the State Constitutions contain provisions against special legislation. Though their language is different, the purpose of these provisions is essentially the same as that of the Fourteenth Amendment. They, likewise, are intended to secure the equality of all persons before the law, and to prevent the arbitrary oppression of any individual or class by legislative action. Hence, a reference to the rulings which have been made under such provisions may be in point in this connection.

In *Mayor of New Brunswick v. Fitzgerald*, 7 *Atl. R.*, 283, it was held that a statute which made a different rule for the government of policemen holding office at will, from that which governed policemen holding under a fixed tenure, was void as special legislation. The court say:

"If a law should provide that in all cities in which the policemen hold offices at will the taxes should be assessed by a board of assessment to be appointed by the Mayor, it would at once be said that such legislation could not be maintained, because based on a false classification. The fact that some policemen hold office at will no more constitutes them a class for separate legislation, than would the circumstance that they receive their pay monthly, while the other policemen receive theirs quarterly-yearly. . . . . The only difference

between such legislation and the old method of special legislation would be that under the old system the legislation would have been directed to the individual case, while under the new law it must be directed to the so-called class. . . . . The Legislature cannot constitutionally do by indirection that which it cannot do directly."

In *State v. Wood, Id., 286*, a statute applying only to towns of less than ten thousand inhabitants, that might be divided into not less than two nor more than three wards, was held to be unconstitutional. The court says:

"Disclaiming all intent to further define a general law, it will serve for the present purpose to say that a law is to be egarded as general, *when its provisions apply to all objects of legislation, distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary and appropriate to them as a class.*"

In *McCarthy v. Commonwealth, 5 Id., 215*, it was held that a statute, which provided that in counties where the population exceeded one hundred thousand and was less than one hundred and fifty thousand, the officers should be paid by salaries and not by fees, was special legislation. The court say:

"If such legislation were to be recognized as legitimate, vain would be the constitutional prohibition of local and special laws. But little ingenuity in the way of so-called classification would isolate every single county, borough, ward, township and school district in the State, and provide for each its own local code."

To the same effect:

Morrison v. Bachart, 5 Id., 739.

State v. Windsor, 2 Id., 658.

State v. Bloomfield, Id., 249.

Van Riper v. Parsons, 40 N. J. L., 1.

Freeholders v. Stevenson, 46 N. J. L., 173.

Gibbs v. Morgan, 39 N. J. Eq., 126.

Ernst v. Morgan, 39 N. J. Eq., 391.

Woodward v. Brien, 14 Lea, 520.

Smith v. Warden, 80 Ky., 608.

State v. Herman, 75 Mo., 341.

Commonwealth v. Patton, 88 Penn. St., 258.

Divine v. Commissioners, 84 Ill., 590.

County of Dougherty v Boyt, 71 Ga., 484,

McCarthy v. Comm., 2 Alt. R., 423.

Scranton's Appeal, 1 Id., 560; S. C. 6 Id., 158.

People v. Hardwood, 6 N. E. Rep., 480.

Anderson v. Trenton, 42 N. J. L., 486.

Zeigler v. Gaddis, 44 Id., 363.

It is clear that this act cannot be sustained without substituting for that equality of all men before the law which has been the aim of our polity since the penning of the Declaration of Independence, the capricious will of the Legislature.

It may be contended that the only effect of our argument upon this point would be to expunge the exceptions, and leave the law as a general one, compelling all railroads to transport passengers for three cents per mile.

It is true that where there is some unimportant provision in the statute which is unconstitutional, and it is apparent that the Legislature would have passed the Act with that clause stricken out, the court will itself erase the clause, and leave the remainder to stand. But this power to make a new law in place of the one passed by the Legislature, is to be exercised with great discretion, and only when it is clear that the Legislature would have passed the Act without the objectionable provision.

Here the provisions allowing shorter roads to charge higher rates are of the essence of the Act, and it is clear that the Legislature would not have passed it without them. To strike them out would be to substitute for the statute a creation of the court which the Legislature would never have approved.

In none of the cases to which we have referred, in which statutes have been held void as special legislation, have the courts stricken out the restrictive clauses, and allowed the acts to stand as general statutes. To do so would be a bald usurpation of legislative functions.

In support of the Act the court below refers to *C. B. and Q. R. R. v. Iowa, 94 U. S., 155;* but that case is not an authority in support of the position claimed. It was not decided that the Legislature could classify railroads according to their length, or according to any other arbitrary standard.

No such question was presented in that case. The Act in question there only provided that railroads should be classified according to their net earnings, and it is upon the express ground that this was a reasonable and just method of classification that the Act was sustained. That was a rule founded upon sound principles; not oppressive to unprofitable roads, and preventing others from deriving an unreasonable income at the expense of the public. Such a case can be no justification for the arbitrary and burdensome classification which has been attempted here.

Respectfully,

U. M. ROSE,

For Plaintiffs in Error.

125-680

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CLERK.

IN THE

UNITED STATES SUPREME COURT.

DOW ET AL. VS. BEIDELMAN.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiffs in error are operating the railroad from Memphis to Little Rock. This is an action to recover the statutory penalty for charging a passenger more than three cents a mile.

Plaintiffs in error took possession of and are running the road as trustees in a mortgage executed by the "Memphis and Little Rock Railroad as reorganized." In the answer in this case, and in the agreed statement of facts, these trustees disclaim and repudiate any corporate rights except what said "M. & L. R. R. R. as reorganized," have under the original act of 1853, under which the "Memphis and Little Rock Railroad" was originally chartered. This Court, in *R. R. v. Berry et al., 112 U. S., 609*, expressly decided that said M. & L. R. R. R. as reorganized, had, and could have, no corporate existence under that act. So the mortgagor in this case was not a corporation. Still less are the trustees in the mortgage a

corporation. They do not pretend to have any corporate existence. They are mere individuals running a railroad. Inasmuch, then, as these trustees repudiate and deny any corporate existence under the constitution of 1874, they cannot invoke any rights or claim any immunities under that instrument.

It was decided by the Supreme Court of Arkansas, in *Yarnell v. Searcy, 47 Ark., 269*, that private individuals can not rightfully operate a railroad in this State, this prerogative of sovereignty being accorded to corporations only.

The trustees in this case being mere individuals, operating the road by sufferance of the State, refusing, as they have done, to clothe themselves with corporate functions under the general railroad act, have no right to complain of any regulation of rates. For lack of the necessary franchise, it is on their part a violation of the laws of the State for them to carry passengers at all. This, we think, disposes of the case, and it is unnecessary for the Court to take up the grave constitutional questions started by opposing counsel in their brief. The amount involved in this case will not justify the printing of an elaborate brief on the part of defendant in error, but he submits the following on the constitutional points:

The power to regulate tolls, like the power to tax, is an ancient and important prerogative of the sovereign. Neither one of these powers depends upon constitutional

sanction. Nothing but an express contract on the part of the State, or a plain constitutional inhibition can prevent the exercise of this prerogative. Restrictions upon this power will not be implied. They must be express. Every thing that has ever been said by this Court concerning the power of taxation applies with equal cogency to the power to regulate tolls. Chief Justice Marshall, in *McCulloch v. Maryland, 4 Wheaton, 316*, said: "The power to tax involves the power to destroy." The Chief Justice in *R. R. Commission Cases, 116 W. S., 331*, said that "the power to regulate is *not* the power to destroy." It is somewhat difficult to reconcile these two declarations. The last, however, was really *obiter dictum*, and must be taken as subject to qualification. The regulation of any occupation by law frequently has the effect to destroy the business of particular individuals.

The constitution of Arkansas makes it incumbent on the legislature to regulate railroad fares. (*Art. 17, sec. 10.*) This, however, is a mere injunction. The power to do this is above and outside of the constitution.

Common carriers are an absolute necessity to the people in these days of modern civilization. This necessity is a sufficient guaranty that these public conveniences will not be destroyed by the representatives of the people.

But suppose the courts undertake to supervise railroad fares, can the courts be trusted better than the legislature? Assuming that each would be actuated by the

highest considerations of justice and patriotism, which is the best fitted for the delicate and difficult task? The legislature can investigate the financial condition and management of railroads at the public expense. The courts are entirely dependent upon the litigant. If a suitor, as in this case, is too poor, or if his counsel is too stupid to collate and present all the facts necessary to an intelligent determination of the question, the Court is helpless. It has no power to make a more thorough investigation. The validity of an important public statute is thus made to depend upon the poverty or stupidity of a particular individual.

It seems to be conceded by counsel that the legislature has some power over the subject of tolls. It is contended, however, that the law-making power cannot prescribe a toll that is below what is reasonable. Now, the Courts have always denied the right of carriers to charge more than what is reasonable; if it is now to be held that the legislature can not prescribe an amount less than this, it follows that nothing can be done by the legislature on the subject. If the object be to have some tribunal to determine what is reasonable, there certainly cannot be two tribunals to determine this single point, Either the legislature or the courts must do it, and it would produce interminable confusion for both to undertake it at the same time. At best, it is largely a matter of discretion. It may be conceded that discretion is sometimes a proper subject of review, but to secure interference there should be a flagrant and aggravated abuse of the discretionary power.

Opposing counsel seem to assume that the validity of a statute is to be determined by its effect financially upon a particular litigant. It is sometimes contended that he is governed best who is governed least. The paternal theory is by some entirely rejected. But our modern corporations, like our system of protected industries, are based entirely upon the paternal idea. The sovereign might, by a valid contract, surrender the power to interfere with the privileges of a corporation or a manufacturing establishment, but in the absence of such contract it is a novel suggestion that the duty on wool or the fare on railroads can not be reduced if it have the effect to cause a given manufacturer or railroad company to lose money. Counsel urge that the act in controversy will prevent his client from making money, as if this was an irrefutable argument. If this were the criterion there would be a great many unconstitutional laws. The brewers of Kansas, we are told, complain of a liquor law the effect of which will be to cause them to lose money. They can with some plausibility contend that they were not built up, and hence should not be torn down, by the government. A railroad corporation or a protected manufacturer does not occupy a position so advantageous.

If the Court were to undertake to supervise the action of the legislature in this particular case, there are no data from which it can be intelligently done. It is admitted that the road cost $1,000,000, but it is not pretended that these trustees, or any persons whom they represent,

built the road. The bonded indebtedness is stated, but how much money these bonds cost is not shown. The capital stock is $1,500,000, but if the net earnings were reduced, as the trustees apprehend, to $60,000, this would not be a bad return on that amount. If the capital invested in this road is more than the face of its capital stock, it is perhaps the first and only instance in the history of corporations. For the Court to presume that the amount of capital put in a railroad is the amount shown by either the stock or the mortgage bonds would be to presume against experience and the notorious facts of history. The actual amount of money which these trustees and their beneficiaries have invested in this road has been studiously concealed. The figures furnished by the plaintiffs in error are false lights, whose only effect could be to lead the Court astray.

A reduction of fare does not always reduce the earnings of a carrier. That this may be the effect in this case is mere apprehension on the part of these trustees. But this apprehension is an unreliable guide. If any one thing has been completely demonstrated by experience, it is that the man who has the least capacity to forecast the effect of railroad legislation is the railroad manager.

The right to regulate railroad fares is no longer an open question. It was settled by the *R. R. Commission Cases, 116 U. S., 307; Stone v. Wisconsin, 94 U. S., 181; Munn v. Ill., 94 U. S., 113; R. R. v. Iowa, ib., 155.*

It is suggested that the classification of roads by length is illegal. This classification is supported by two or three important considerations. In the first place it is the universal experience that transportation rates can be reduced in proportion to the length of route. This is recognized by the general usage of carriers. Transportation per mile is less from New York to Liverpool than from New York to Boston. It is less from Cairo to New Orleans than it is from Cairo to Paducah. It is less from San Francisco to New York than it is from Albany to New York. These instances might be multiplied *ad infinitum*. Again, the long lines which draw patronage from a large extent of territory and which are themselves fed by the tap roads can secure a greater amount of traffic per mile than the tap roads, whose patronage is necessarily more limited. This is true of waterways as well as railways. This general rule is not affected by the few exceptions which may be found to exist for the time being. Besides in the sparsely settled agricultural and timbered regions of the West it is important to secure the building and operating of these short roads, which extend into the interior as arms from the main lines. They develop the country, and in encouraging these enterprises there is a wise public policy to be subserved. These reasons may not apply so forcibly to the more densely populated settlements of the older States.

In this connnection it would not be well to overlook the fact that the railroad proprietors of the country made great

efforts, while opposing the interstate law, to convince our statesmen that to transport goods and passengers a long distance was much cheaper than to transport them a short distance.

To classify railroads by length for the purpose of rates has been quite generally adopted, especially in the Western States. See—

Revised Statutes of Mo., 1879, vol. 1, p. 146.

Howell's Anotated Statutes, Mich., 1882, p. 840, sec. 3,323, sub. secs. 7 and 9.

Laws of Pa., 1876, No. 87, p. 116.

Hittell's Code and Statutes of Cal., sec. 5,489.

Com. Laws of Kan., 1879, p. 225, sec 57.

Acts of Wis., 1874, p. 600, sec. 4.

Opposing counsel have cited a number of cases from Pennsylvania and New Jersey to show that such a classification is unconstitutional. We beg to call attention to the following cases *contra* from the same States.

77 Pa. St., 338; 85 Pa. St., 401; 88 ib., 258; 112 ib., 382; 106 ib., 377; 40 N. J., 1; 48 N. J., 310. See also *18 Ohio St., 85.* See also *Cooley's Con. Limitations, 5th edition, p. 154, note.*

We have had instances of classification being used as a subterfuge to evade the constitution. Such was the case in *Devine v. Comrs., 84 Ill., 590.* But it is not claimed that such was the object in this case.

If the classification be such that the act complained of

"operates uniformly on each class, this is all the constitution requires."

Chicago, etc., R. R. v. Iowa, 94 U. S., 155.

See also—

L. R. & Ft. S. R. R. v. Hannaford, 49 Ark.

Counsel suggest that the proper criterion of classification would be by net earnings, and that, if such a criterion were adopted, "the roads would class themselves." This last suggestion is intended no doubt as a piece of humor. If the citizen were required to figure out the net earnings of a particular railroad before he could tell how much fare to pay he would hardly be able to get off on the first train. If the legislature were to calculate the earnings in committee room they could only judge the future by the past, and if they were to fix the fare of the several roads by this standard their forecasting of the future might miscarry by some turn in the fortunes of the roads. Besides, while an act of this kind would be good enough if the act itself should embody the estimates and reasons for designating different fares for different roads, yet suppose the act should prescribe different rates for each road without assigning the reason? If such a law was passed, arbitrarily naming different rates for different roads, then it would be a palpable violation of the "equality" demanded by the constitution of the United States. It would therefore become necessary for the act to embody the reasons for its passage in order that its constitutionality might be apparent to the Court.

The whole argument of counsel points to the conclusion that it would not be constitutional to prescribe the same fare for all the roads, and since there must be some distinction, it can only be made by classification. We see to what absurdities a classification by net earnings would lead, and as counsel suggest no other method, we conclude that the method adopted by the act in controversy is correct. It conforms to the usage and experience of the commercial world, it conserves an important public policy, it yields something to the earnest contention of railroad proprietors and managers, and, last but not least, it has the merit of simplicity.

We submit that the judgment of the Supreme Court of Arkansas should be affirmed.

JOHN H. ROGERS,

For Defendant in Error.